UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 23 CR 251 (AKH)

CHARLIE JAVICE and OLIVIER AMAR,

Defendants.

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New York, N.Y.
September 23, 2024
2:30 p.m.

Before:

HON. ALVIN K. HELLERSTEIN,

District Judge

APPEARANCES

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Appearances (Continued)

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THE DEPUTY CLERK: This is U.S. v. Charlie Javice. Counsel, please state your appearances for the record.

MR. CHIUCHIOLO: Good afternoon. Nicholas Chiuchiolo, Dina McLeod, Rushmi Bhaskaran, and Georgia Kostopoulos on behalf of the government.

THE COURT: Who pushed you out of your seats?

MS. McLEOD: Davis Polk.

THE COURT: They must be a powerful bank.

Yes, Chase people.

MR. ANDRES: Good afternoon, your Honor. Greg Andres, Sidney Bashago, Michelle Adler, and Christian Hines, all from Davis Polk on behalf of JPMorgan.

THE COURT: Good afternoon. And in the back row. How are you.

MR. NITZE: I'm well, thank you, Judge. How are you. Sam Nitze and Jose Baez for Charlie Javice, who is here in the courtroom with us.

THE COURT: Mr. Baez, this is our first chance to say hello.

MR. BAEZ: Hello. Pleasure to meet you.

THE COURT: Welcome to the case.

MR. BAEZ: Thank you.

THE COURT: For Amar?

MS. SWETTE: Good afternoon. This is Alexandria Swette and Steve Kobre on behalf of Olivier Amar, who is here

at counsel's table.

THE COURT: Mr. Andres, what I don't understand is this. Every document that was listed on the privilege log was a document that was potentially producible. It wasn't produced because it was allegedly privileged.

I held that almost half of those documents that were listed as privileged were not privileged. So, they should go under the initial umbrella and produce them.

It indicates if a sample of 10 percent had 50 percent not privileged, the entire mass is half not privileged.

So I don't know if these things are important or not. I suspect they're not. But, since you started to produce and you were producing them, follow through.

MR. ANDRES: Your Honor, to the extent that's a question and not an order, I'm happy to respond.

THE COURT: Oh, it is a question. Didn't you hear?

MR. ANDRES: I didn't want to be presumptuous and start things off being presumptuous.

Before we get started, I just wanted to clarify a correction with respect to the footnote 2 in our response. We referenced 35 documents -- excuse me, 34 documents. And instead we should have referenced 160. We've let all the parties know that before we got to court here today.

Let me back up for one second and answer your question.

I would take issue with your Honor's characterization of what you asked us to do and what your ruling was at the end of the last hearing. At the end of the last hearing, we reviewed approximately 12 documents, and you very helpfully, the Court went through each one of those documents and agreed or disagreed with our privilege calls, and asked us to apply those not to half of the documents, but instead to a sample 10 percent.

THE COURT: Right.

MR. ANDRES: 2300 documents. And you asked the defendants to take their best shot, since they had the privilege logs, understood who was on those documents, whether they were lawyers, not lawyers, what the subjects were. You asked the defendants to pick their 2300, 10 percent, best documents, and they weren't able to even do that.

They instead produced to us 2240, 2242 documents, so they didn't make it -- the reason I point that out is because these are the documents that they thought were the most likely to have relevant information. And we went through that exercise at the Court's direction.

At the end of that hearing, your Honor said I have concerns -- I don't want to paraphrase, obviously you can review the transcript. I'm not really sure what the purpose of this is, because the information that they're receiving does not appear to be material or relevant in any way to any

defense. You're getting dates and somebody saying send me another e-mail or the core of what's being unredacted is not material or relevant. And what your Honor said was, trying to grapple or understand whether the burden on the third-party victim, JPMorgan, for whom the defendants are accused of stealing more than $150 million, whether the burden to them is appropriate, given what the byproduct is or what it is that the defendants are receiving.

THE COURT: I'm not sure, to tell you the truth. I've not made a study. Rule 16 is the guidepost. And under Rule 16, a subpoena -- under Rule 17, a subpoena was issued, the bounds of relevance being Rule 16.

You produced a lot of stuff. You also produced a privilege log. I assume that what was on the privilege log, had it not been privileged, would have been produced.

So, if now it seems that a big chunk of those are non-privileged, inferentially it should have been produced.

I can accept every word you said. But, logically, I think you've got to agree with my logic. Now, maybe the logic doesn't make sense. Which time are we talking about? How much effort? How much money? Before I get rid of this issue.

MR. ANDRES: Okay. Your Honor, if I could just, before we --

THE COURT: We're in a bad position if I don't order production.

MR. ANDRES: I understand that. But your Honor, if I could just address one issue before we talk about time and cost.

I want to not conflate the Rule 17 subpoena and the Rule 16 or the grand jury subpoena that the government issued to JPMorgan. And in the course of that, JPMorgan's produced more than 25,000 documents. Let's talk about that for a second.

There are 23,000 documents on the privilege log before we did the 10 percent exercise. Of the remaining 20,000, I'm using rough numbers, 5,000 of those relate to the defendants' Rule 17 subpoena. 15,000 relate to the grand jury subpoena. And what your Honor ruled specifically, now I'm quoting from the last hearing was --

THE COURT: But I'm only interested in the 17(c).

MR. ANDRES: Yes. So those are 5,000 documents, your Honor. And if where we're headed is that your Honor can't make a determination about the relevance of those, and we should apply your rulings or apply the rulings from the last hearing to those documents, I think we could agree to that with certain exceptions so we're not producing or rereviewing duplicates or we're not reviewing documents that are irrelevant.

So, the defendants have argued that we've waived, etc. We don't agree with that. But if what you're saying is we have to review the remaining 5,000 that are relevant to the Rule 17

subpoena, we would agree to that. We do not think that we should have to rereview all of the documents.

THE COURT: Why were they on a privilege list?

MR. ANDRES: There are two different requests. One was a privilege log relating to the government's subpoenas in which your Honor ruled last time it is up to the government to enforce its own subpoenas, not the defendants. So the privilege log includes both Rule 17 and the grand jury material. If all we're talking about is Rule 17 --

THE COURT: Why did you do that?

MR. ANDRES: Because that's what we were ordered to do in producing a privilege log. We had a privilege log that covered all of the documents produced in this case.

THE COURT: I ordered you to produce a privilege log for the grand jury subpoena?

MR. ANDRES: Your Honor, I think that may have been before we were in the case, so I don't remember that specifically. But the reality is that all of the documents produced in this case, either the Rule 16 -- I'm sorry. Either the grand jury subpoena or the Rule 17 are, for ease, are on one document. One privilege log.

THE COURT: What do you want me to do?

MR. ANDRES: What I want you to do, your Honor, is confine the rereview to the documents in the Rule 17 subpoena, which is what relates to the defendants' application, for the

reason that you ruled last time, that the defendants are not in the position to --

THE COURT: If I were to seek to so order, and you were to assume, which is what I would order, that there has been no waiver, is that an acceptable order?

MR. ANDRES: I'm sorry, your Honor. I didn't understand that.

THE COURT: What Mr. Andres proposes is that I confine the privilege log to that which relates to the Rule 17 subpoena. There are approximately 5,000 documents on that privilege log. And I order JPMorgan Chase to go through that log and make the same kind of analysis that it did when it produced 1,000 additional documents following our last session together.

MR. ANDRES: Your Honor, that would be acceptable to us, as we note in our brief.

THE COURT: I'm asking Mr. Nitze though. Is it acceptable to Mr. Nitze.

MR. NITZE: Not really, your Honor. And if I might provide a reason why.

So just to go back in time a little bit, and this was before the good people at Davis Polk joined the matter. You'll recall that it's over a year ago now, this all began, and we, the defendants, were trying to get information from the government, to get the government to expand the list of

custodians, expand the list, the types of materials we were going to get through the government. And the government argued, and I think the Court agreed, look, it's not for you, defendants, to be policing the scope of grand jury subpoenas, that's Rule 16.

And at some point in that process we said, well, there is this privilege log, and we think it's holding back materials that we ought to have. And you basically said, well, there is a mechanism for that, and it's Rule 17. If there is something you think you need, do it through Rule 17. And we had an appearance before your Honor --

THE COURT: You don't need my signature. You could just issue the subpoena.

MR. NITZE: Yes, and we had --

THE COURT: Saying that also.

MR. NITZE: We had a motion to quash effectively and litigation before the Court on the scope of Rule 17 and what we could have, and the bank argued --

THE COURT: I remember. And you fellows got together and you came up with an acceptable production list, and I didn't have to make any rulings.

MR. NITZE: Well, you adjudicated the proper scope of the subpoena.

If you bear with me, the reason I'm raising all this, it answers the Court's question about why we have a log that

includes documents that are privileged in connection with the Rule 16 process with the grand jury subpoena. And the reason is, we had as part of our Rule 17 subpoena a request for all documents on the log, that is the log that was given to the government, so that we could be in privity, so to speak, with the bank.

So all of these documents, Rule 16, Rule 17, are the subject of our requests for materials. And so every bit of it, it's not just the 5,000 documents. The bank consented to this process. The Court ordered this process. We have this moving target here where we keep trying to just get --

THE COURT: I don't recall ever focusing on a difference between the privilege logs for the government and the privilege logs for your subpoena. This is the first time I hear about this.

MR. NITZE: It's in the briefing and we discussed it. I would be happy to put a letter to the Court about it. But it is the reason why --

THE COURT: Don't write more letters.

MR. NITZE: What's that?

THE COURT: Don't write any more letters.

MR. NITZE: You don't want any more letters.

THE COURT: I want to resolve this. I think there is no principle involved here, there is zero. It is even debatable whether there is anything useful in this. Everything

I've seen so far, if it were produced, is relevant against you. Not for you.

MR. NITZE: Your Honor, with respect, I don't think that's right. There are relevant materials. And even things that are against us give us context for how to understand other materials in the record. And the burdens go both ways here.

THE COURT: I have no way to know.

MS. SWETTE: Your Honor, if I may, this is Ms. Swette on behalf of Mr. Amar.

Some of the documents that have fallen off the privilege log are documents that we put in our submission for our advice of counsel defense. These are documents in which our client or Mr. Nitze's client are communicating with in-house counsel for Frank. They're running through in-house counsel various disclosures that end up either on the website or in pitch materials. These are documents that have been withheld from defendants for over a year. They are responsive and material to the defense.

So these are documents, the efforts the bank is undertaking are yielding documents that are ones that could be used in advance of defendants' defense at trial.

MR. ANDRES: Your Honor --

THE COURT: Let me take a comment before we go further.

We're in an area where the law is against the

defendants. A very fine decision by my colleague on this point, to the effect that you don't have the privilege at all. Maybe because I came up in a non-governmental way, I disagree with him. But not because the law tells me to disagree with him, but because I have an issue with basic fairness.

If you were given advice and you were part of a corporate web, it's never been so clear to me that the advice is not personal as well as corporate. At least there is a core to it. If I were shown that particular advice was focused on something personal to the individual, I would order it produced.

But we're dealing in an amorphous, ambiguous field. So I want to tell you where I'm coming from, and then I'm going to ask you to work it out.

(A) The large number of documents on the privilege list that should not have been on the list indicates to me that there should be a further inquiry. (B) I do not wish to impose a burden on Chase to go through -- how many documents?

MR. ANDRES: 23,000.

THE COURT: And I don't want to prolong the discovery, pretrial discovery, even though I've adjourned the trial date. And (3) I'm not here to enforce the government's subpoena.

And so, it's logical to me to focus on that aspect of the privilege log that focused on the Rule 17 production.

With those three criteria, I'd like to call upon you

to have a conference and to work something out that would be not unsatisfactory to anybody.

Is that worthwhile or do I have to rule?

MR. ANDRES: We're willing to give it a shot, your Honor. Thank you.

THE COURT: Mr. Nitze?

MR. NITZE: We'll try, yes.

THE COURT: Ms. Swette?

MS. SWETTE: We'll try.

THE COURT: So shall I go back to chambers for an hour and then come back? Or sooner if you tell me to?

MR. ANDRES: Happy to try to do it now, or if it's more helpful, we could get back to your Honor within a day or two. But whatever you prefer, your Honor.

THE COURT: You could either agree or not.

MR. ANDRES: Fair enough.

THE COURT: That's good. Take a short period of time. But I think it would be a good idea for everybody to agree on something.

See you in an hour. Or if you finish before, call me, Brigitte is in the back. Just let her know.

MR. ANDRES: Thank you, your Honor.

(Recess)

THE COURT: Talk to me, I hope you have good news.

MR. ANDRES: We have good news, your Honor. I can't

say we've solved world peace, but we've settled on what I understand the agreement is, and I understand that Mr. Nitze and Mr. Kobre may want to add certain reservations or rights.

But my understanding of the agreement is that JPMorgan Chase will rereview the materials that are responsive to the Rule 17 subpoena with the following exceptions.

That documents that are duplicatives, that is real duplicatives, we will not have to rereview, and together with the defendants we'll establish a protocol to demonstrate that these are in fact duplicatives, so there's no disagreement about that.

Secondly, we have agreed that we will not be required to rereview documents that are not relevant. And just for the record, to be clear, because it may not seem obvious what's not relevant to a document that's on a privilege log that relates to a subpoena. If an e-mail has two attachments, and one attachment relates to the deal at issue with Ms. Javice, and has a second document attached that has to do with a deal with Coke and Pepsi, the Coke and Pepsi document wouldn't be relevant and wouldn't have to be produced. So the second caveat is we've agreed that documents that are not relevant don't have to be produced.

And the third --

THE COURT: Relevance being defined as something having to do with matters not involving the deal between Chase

and Frank.

MR. ANDRES: Right. Broadly construed. We are not trying to draw narrow lines here, as witnessed by the example I gave you. Coke and Pepsi have nothing to do with this. They would be completely extraneous.

And the third issue I suppose is duplicative of the first two, but it has to do with different threading on the e-mails, and if there is an e-mail that includes a thread that is either not relevant or duplicative, we wouldn't be required to reproduce that as well.

Once we talk about threading it gets a little beyond my competencies. That's what we've agreed to. We've agreed to do that.

Produce those 5,000 documents over the next seven weeks and to do it in rolling production, so we wouldn't do it all at once. That much we've agreed on. To the extent we got more technical than that, we would prefer to do the rolling every two weeks because it saves us time on the actual production.

My understanding is that's what JPMorgan and the parties, the defendants have agreed to, and we've alerted the government to that as well.

And I'll leave it at that.

THE COURT: Let's do seven weeks, rolling. A seventh each week.

MR. ANDRES: I didn't hear you.

THE COURT: A seventh each week. 14 percent a week.

Mr. Nitze?

MR. NITZE: Yes, thank you, Judge. Just a couple of points for the record, please.

We understand your Honor to have ruled against the defendants in our application for broader rereview, and we just want the record to be clear. We heard you to direct us to come to some compromise, but we do not consent, broadly speaking, to this process. And the reason for that is, we have 23,000 entries in a log --

THE COURT: Once you get this, then you are going to ask for more?

MR. NITZE: Well, no. Maybe. The point I'm making is we have these entries on a log that, but for the assertion of privilege, would have been produced either to the government or to us. And we have an error rate, so to speak, of well over 50 percent. 90 percent, depending how you do the math. It appears to us there are thousands --

THE COURT: The error rate is skewed by the selection that you made of the documents to be searched.

MR. NITZE: That could be.

THE COURT: So --

MR. NITZE: That could be.

THE COURT: Any percentage higher than what we have is

false, and the percentage we have of almost 50 percent is unreliable.

MR. NITZE: I don't hang my hat on the percentage. I mean, 50 percent understates it.

THE COURT: We could say there is an appreciable number of documents that, following my rulings, are more susceptible to being produced.

MR. NITZE: Yes. And we had understood your Honor through previous rulings to effectively put us on the other side of the bank, not across the Rule 17, but with the entirety of the privilege log, with the ability to challenge. And candidly, I don't know why the government -- I understand it is not our job to enforce their grand jury subpoena. But I don't know why the government, aware there are thousands of documents responsive to a grand jury subpoena, doesn't care to ask for them. But that seems to be the situation we're in.

THE COURT: I don't think we're ever going to have a malpractice case based on that assertion.

MR. NITZE: That's probably fair to say.

I guess the last point I'd make, I know your Honor is very eager to put this whole issue behind you. Believe me, we are as well. But I do feel the need to say we reserve the right to issue follow-on Rule 17 subpoenas. We hope this will be a clarifying process. But as the witness list comes into view, and as we understand the details of the materials that

remain behind, it is possible we will return to the Court or at least out in the world with subpoenas, and potentially to the Court, to the extent they are opposed, to sort through these issues further.

THE COURT: So as I understand you, you're agreeing because you feel I compelled you to agree.

MR. NITZE: I think that's fairly put. We have fashioned a compromise in the shadow of the order denying our motion to compel, so we went back and worked in good faith. Given your Honor's ruling that we can't have access to the portion of the log that addresses Rule 16, we've in good faith tried to reach a sort of distant second-best compromise.

THE COURT: Very well. Ms. Swette?

MS. SWETTE: Your Honor, we echo what Mr. Nitze said. We consent to this process, insofar as it comports with the Court's ruling. We do hold open we may subpoena for additional documents that happened to have been swept up in the Rule 16 production that are on the privilege log that don't on their face appear to be privileged.

THE COURT: Hearing that, Mr. Andres, do you have any further comment?

MR. ANDRES: No, your Honor.

THE COURT: I order the production as recited by Mr. Andres.

Now, I'm not supposed to meet with you until the final

pretrial conference; is that right?

MR. NITZE: We may find occasion to come before your Honor before then, but yes, I think you set --

THE COURT: I have nothing scheduled until the final pretrial conference.

MR. NITZE: Correct. And I think the government has a proposed schedule for intervening dates. We would ask for just a day or two to confer and file something, hopefully jointly to the Court, proposing adjusted dates for motions in limine and so on, disclosure of exhibits.

THE COURT: My thought was that I would use that final pretrial conference date to decide 404 motions, motions in limine and the like. I'll reserve the entire day for you. Would that be sufficient?

Government?

MR. CHIUCHIOLO: That works for the government, your Honor. Thank you.

THE COURT: Is it sufficient?

MR. CHIUCHIOLO: Yes, your Honor. And the government does have a proposed schedule that largely mirrors the schedule that the Court had previously set.

THE COURT: I don't really care what your schedule is leading up to it. What I do care about is that you give me a week with the finished papers so I can appear to be informed.

MR. NITZE: We care a great deal, your Honor, as you

might imagine, just with respect to disclosure of witness statements, and I think we're working with the government. I think we can come to agreement. We just would ask to file a proposed schedule with your Honor in a day or two.

THE COURT: My rule is that on or as soon before the final pretrial conference the government has to disclose *Giglio* material, Jencks material, and the like. I have no reason not to extend that back further.

MR. NITZE: We have a proposal from the government with some dates that we're considering. You're making me think we should accept them on the spot.

THE COURT: You might. You might. That's been my practice. There has to be some good reason why I should change it. So I thought that might help you come to decision also.

Do we have any experts in this case?

MR. CHIUCHIOLO: The experts -- there have been expert notices by defense, your Honor.

THE COURT: You didn't answer my question. Talk to me in plain English. Are there experts in this case?

MR. CHIUCHIOLO: There are experts that the defense intends to call at trial. I expect that would be the subject of motion practice and motions in limine. The government --

THE COURT: Is the government going to use any experts?

MR. CHIUCHIOLO: No, your Honor.

THE COURT: You answered my question.

Have defendants, I'll speak to you again, has the government made disclosure to you of its experts? Has the defense made disclosure?

MR. CHIUCHIOLO: They have, your Honor. In the government's view they're not sufficient, but they have provided --

THE COURT: They've told you who the people are.

MR. CHIUCHIOLO: Yes, your Honor.

THE COURT: How many?

MR. CHIUCHIOLO: Four, your Honor. One defendant has noticed three experts, and the other defendant has noticed one expert.

THE COURT: I suspect when we come down to trial there will be fewer experts. I also require in terms of disclosures, disclosures conforming to the civil rules about experts. So that there should be full disclosure of what their opinions are going to be. There shouldn't be any hide the ball with that.

MR. CHIUCHIOLO: It sounds like we have an agreement on dates, your Honor.

THE COURT: Super.

MR. CHIUCHIOLO: Monday, December 16, preliminary government exhibit list, witness list, and Jencks Act material.

THE COURT: And *Giglio*.

MR. CHIUCHIOLO: January 6.

THE COURT: *Giglio*.

MR. CHIUCHIOLO: Yes, with the 3500; yes, your Honor.

Monday, January 6, preliminary defense exhibit list, Rule 26.2 material --

THE COURT: Sorry. You said the defendants' exhibit list?

MR. CHIUCHIOLO: Yes, for January 6.

THE COURT: And?

MR. CHIUCHIOLO: Their Rule 26.2, their 3500, as well as their preliminary witness list.

January 13, motions in limine, requests to charge, and voir dire.

THE COURT: January 13, motions in limine.

MR. CHIUCHIOLO: Motions in limine, requests to charge, and voir dire.

And then oppositions to motions in limine on January 27.

THE COURT: That's fine. That gives me lots of time.

MR. CHIUCHIOLO: Then, your Honor, on the issue of disclosures, the government does have one issue to raise with the Court prior to the end of today.

THE COURT: Let me make some comments.

On voir dire, I have my boilerplate. Don't bother with that. I'm interested in the particular questions that pertain to this case. The particular sensitivities that you

have that you want me to bring out. So focus on that.

Similarly with request to charge. I have my boilerplate. Focus on this case. That's really what I want.

I want to ask you something else. It is a four-week trial. When I did the long trial, which was nine weeks, and was predicted to be seven, we broke the voir dire into a preliminary phase, where we identified the number of jurors we would need, and we just asked them questions, one by one, to elicit their ability to sit. Shall I follow that here? I'm going to take your comments in advisement, because I want to put this question to the jury clerk.

MR. NITZE: Are you referring specifically to ability to sit for the anticipated duration, like a question of conflicts and the like?

THE COURT: Just ability to sit. "I have a vacation in two weeks."

MR. NITZE: Right, right.

THE COURT: "I'm giving birth in three weeks." Things like that.

MR. NITZE: I don't know what the Court's usual -- I would think in some fashion, although it could be handled generally, rather than one by one, you would want to ascertain if people have immoveable conflicts, somebody's taking care of --

THE COURT: I'll give you my experience. If you do it

en masse, there are many more conflicts. One learns from the other. This works.

MR. NITZE: Certainly no opposition doing it one by one if you think that is more efficient.

MR. CHIUCHIOLO: No opposition from the government, your Honor.

THE COURT: I'll consult with the jury clerk on that.

MS. SWETTE: No opposition from Mr. Amar.

THE COURT: The next comment.

MR. CHIUCHIOLO: Your Honor, are you envisioning a questionnaire or a date --

THE COURT: We're not using a questionnaire.

MR. CHIUCHIOLO: Just a date for them to come in?

THE COURT: They're brought in one by one, and I ask them questions, what's coming up in the next six to eight weeks.

MR. CHIUCHIOLO: Understood.

THE COURT: I tell them about the trial in a way to interest them about it so they want to sit. And I think once they learn that there are no narcotics or guns or organized crime, it becomes a little easier for them.

And in the setting of a room with the lawyers, and we have to restrict the number of people in the room because you don't want to be overbearing, you get good answers. We'll get a jury. We were surprised how quickly we got a jury.

I'm always bothered on lists of exhibits by their fulsome nature. And one technique that we've all learned to use in the age of disclosure is to so overburden disclosure it becomes hard to discern what's really being disclosed. So I would adjure you to the disciplined identification of exhibits. I think you know enough from experience as a trial lawyer that only a few exhibits count. The more exhibits that are used, the lower the threshold of boredom by the jurors. And a bored jury is the worst kind of jury to have. They're more unpredictable and that hurts either way.

Try to be disciplined with your witness list and be disciplined with your list of exhibits.

I take it that Daubert motions will be, if they are to be made, will be considered as motions in limine?

MR. CHIUCHIOLO: That was the government's plan, your Honor.

THE COURT: Okay. So would you like to know how I pick a jury?

MR. NITZE: Yes.

THE COURT: Okay. We seat -- how many alternates we will need, four?

MR. CHIUCHIOLO: At least four, given the length of the trial.

THE COURT: I think four is enough. Again I'll take -- Hannah, ask Brigitte to come out.

I'm going to assume four jurors. So we have, therefore, two challenges per two jurors, that gives us six people. I will sit 34 people in the array. After we finish all the questions, then have an account they give about themselves, where they were born, their education, their work, the people in the household, what they read, what they listen to and on so on.

After all that, you then exercise your peremptories. You will do them at your desk or in the hallway or anywhere around. It is a 20-minute procedure. Each side will exercise his peremptories. The defendants exercise 10, and the government 6 to the first 28 in the array. At the same time you'll exercise your peremptories to the Jurors 29 through 34 to exercise against alternate jurors, and you'll give this up to me at the end of the session. One piece of paper.

So as to the first 28, if you coincide in your peremptories, or you don't exercise your peremptories, I excuse Jurors No. 28 and down so that we have a jury of 12.

And then I turn to the alternates, and do the same thing, and if you coincide, or don't exercise, I will start from Juror No. 34 and challenge down to the time of four jurors who are alternate jurors, which will give us a jury of 16, the number of seats in this room. Whether we'll stay in this room or a larger room, I don't know. I think a larger room would be better. But I'll have to work that out.

At the end of the case, there is a question whether alternates should be excused or should be held on standby. I've never used the procedure of standby, because if a standby juror has to be brought into the panel, the jury is required to begin deliberations anew. And it has always occurred to me that is a very large task for the human mind to accomplish to start afresh, and it seems to me artificial. Once we start deliberations, we can go ahead and even lose a juror and still be able to come to a verdict that's acceptable. But you think about that. We'll decide.

Are there any other questions? You're going to be using electronic exhibits, right?

MR. CHIUCHIOLO: Yes.

THE COURT: Defendants?

MR. NITZE: Yes, your Honor.

MS. SWETTE: Yes, your Honor.

THE COURT: Okay. Any other questions of me?

MR. NITZE: Not from the Javice team. Thank you.

MS. SWETTE: Not at this time on behalf of Mr. Amar.

THE COURT: I think we're adjourned.

MR. CHIUCHIOLO: Your Honor, there was one issue that the government wanted to raise.

THE COURT: Yes.

MR. CHIUCHIOLO: And that relates to the defendants' disclosure of their notice of advice of counsel defense.

As the Court is aware, on August 20, the Court ordered the defendants to disclose by December 6 whether they intend to present an advice of counsel defense, and if they do, to identify the attorneys who gave the advice, and when they gave the advice, and if oral, describe the substance of that advice, and if written, to disclose the documents.

On December 6 or September 6, rather, the defendants filed a letter saying that they may present an advice of counsel defense, but other than that, we're still largely in the dark as to what the contours of that defense would look like. They cited examples of documents, and the government appreciates that there is an ongoing dispute about documents and the privilege log. But the defense cited no oral statements, no oral legal advice that would be the subject of this defense. And this is information the government's been trying to get for a year now.

And it would seem if there is legal advice that the defendants relied on that would negate their mens rea, which is what would establish an advice of counsel defense, they should know that and they should be ordered to disclose that to the government consistent with the Court's order. And they still haven't done that.

So, the government would ask that the Court order the defendants to do that, again.

MS. SWETTE: Your Honor, Ms. Swette on behalf of

Mr. Amar. We complied with the Court's order.

THE COURT: No, you didn't.

MS. SWETTE: We're not aware of any rule or case law that requires any additional disclosure above and beyond what we provided.

I think the government is now asking for things we don't intend on disclosing because they're either not available to us or we don't intend on relying on them at trial. Within the contours of what is available to us, we've fully complied with the Court's order.

MR. CHIUCHIOLO: Your Honor, again, the government appreciates the ongoing issues related to documents.

THE COURT: What's the law?

MR. CHIUCHIOLO: I think we --

THE COURT: What's the law?

MR. CHIUCHIOLO: I think your Honor said that a disclosure that is not fulsome is not a disclosure at all, in substance.

THE COURT: They're declining to do more. So, can I order them to do more?

MR. CHIUCHIOLO: I think what we would like to know is --

THE COURT: I know what you want to know. And if the law requires, I'll order it. But is it discretionary? Am I required?

MR. CHIUCHIOLO: Respectfully, the Court did order it.

THE COURT: We are where we are right now, okay. So the defendants decline to do so. Should I hold them in contempt? Should I prevent them from using an advice of counsel defense?

MR. CHIUCHIOLO: At least if there are oral statements or oral legal advice that they wish to put in at trial, yes, that should be precluded, because they were ordered to disclose it and they failed to do so.

I think it's a pretty reasonable request. They are saying that there is this potential defense out there. If they truly relied on legal advice, they should know what it is.

THE COURT: You told them what your witnesses are going to say?

MR. CHIUCHIOLO: We are disclosing our witness statements quite early. But --

THE COURT: You are disclosing 3500 material, but you're not really disclosing what your witnesses are going to say. Why should you get what they want to say?

MR. CHIUCHIOLO: I think it's very different in kind. This is a defense that they are now saying they may put on.

THE COURT: You are going to prove mens rea. They want to disprove mens rea. What's the law?

MR. CHIUCHIOLO: We can put in --

THE COURT: We can reason this to death. What's the

law?

MR. CHIUCHIOLO: We can put in a letter on the law on this. I think it's -- I think your Honor was correct in ordering them to do it. And we're happy to provide some additional law to support this very basic disclosure of what is the legal advice.

THE COURT: My view --

MR. CHIUCHIOLO: Your Honor, the government, I mean, based on -- they've identified the lawyer, right. And we've obviously met with that lawyer. We have a sense of what that lawyer is going to say. We think based on that, there can be no valid legal, valid advice of counsel defense.

But unless we know what the advice is to be, how can we brief any issue? It makes it nearly impossible to put before the Court what the nature of the dispute is until it's too late, before the jury has already heard it.

THE COURT: The same is true of all other witnesses. That's why we have cross-examination.

I think what I should do, though, is to require defendants to identify the documents that will be used to support the advice of counsel defense. So when would you like to do that?

MS. SWETTE: Your Honor, we have disclosed the documents in our possession that we've been able to see and review.

THE COURT: What I mean by identifying the documents is to say "Dear government, here are the documents that we will use in support of the defense. Very truly yours."

Can you write such a letter? And when?

MR. NITZE: The letter that was provided effectively says what you just described.

THE COURT: I don't like the word "effective."

MR. NITZE: I'm building in some qualifications.

THE COURT: I'm not letting you build in any qualifications. I want identification of documents. I'll be lenient on time, but I want identification of documents.

MR. NITZE: Of the particular documents, so, we have a deadline now for defense exhibit disclosures I believe --

THE COURT: December 6.

MR. NITZE: January 6.

THE COURT: December 6 is the government's list.

MR. NITZE: The government's December and then ours are in January.

THE COURT: So what about if you add to that defendants' witness list a special identification of the documents that will be used in support of your advice of counsel defense.

MS. SWETTE: Your Honor, on behalf of Mr. Amar, that deadline works for us. I will say there are still a handful of documents that on their face don't appear to be privileged that

would potentially --

THE COURT: Not going to review that again.

MS. SWETTE: I hear you, your Honor.

THE COURT: You will have whatever you have on January 6 that you're going to use. You are going to set down or I won't let you use it.

MS. SWETTE: Okay.

THE COURT: It's got to be clear and marked, these are the documents that will be used to support advice of counsel.

MS. SWETTE: Understood. Thank you, your Honor.

THE COURT: Okay. What further mischief do you have for me, Ms. McLeod?

MS. McLEOD: Thank you, your Honor. So, first of all, I think the main concern we have is sort of the efficient running of the trial, I think --

THE COURT: That's my job.

MS. McLEOD: We share that with your Honor.

THE COURT: That's my job.

MS. McLEOD: It is your job.

THE COURT: I'll do my job if you do yours.

MS. McLEOD: I think in part, towards that end, you had ordered them to do this some time ago. They put in a letter, the --

THE COURT: Are we now going to renew the last argument?

MS. McLEOD: No, your Honor.

THE COURT: I'm not going to require them to answer an interrogatory of what their lawyers' advice was. I'm not going to ask them to do that.

MS. McLEOD: That's totally understood, your Honor. I think the one thing that we wanted to note is just the level of potential litigation which I think both sides have now noted, they noted in their adjournment request their concerns about the level of litigation that would need to arise in order to have this be an efficient process pretrial.

THE COURT: I don't know what you're talking about.

MS. McLEOD: So for example, your Honor, so to the extent there is an advice of counsel defense, the government is entitled to discovery. We are entitled to see the documents upon which they rely. All of them. We are also entitled --

THE COURT: Ms. McLeod, I ordered it for January 6. Is that too late?

MS. McLEOD: In the government's view, yes.

THE COURT: What would you like?

MS. McLEOD: I think we would prefer the Court's order, but we understand you would like to give them additional time.

THE COURT: I haven't said anything about that. What would you like?

MS. McLEOD: We would like them to provide it in the

next two weeks, they should provide it to us.

THE COURT: Let's go --

MS. McLEOD: Four weeks.

THE COURT: They're not ready with that until they're finished with the lists and the productions.

MS. McLEOD: Seven weeks.

MR. NITZE: Your Honor, we won't have the --

THE COURT: Stop, stop, stop.

I propose December 7.

MR. NITZE: Your Honor, December 7 would work with respect to documents that we have available at that time.

THE COURT: You're not getting any more later. Seven weeks have elapsed.

MR. NITZE: We've indicated that, depending on what comes off the log, we may need to seek additional materials.

THE COURT: You may seek, but you may not find.

MR. NITZE: We may not, but we can only give notice --

THE COURT: December 7.

MR. NITZE: -- of what we have. If the interest here is in efficiency and building in time for pretrial litigation, you know, we would welcome the government's exhibit list and witness statements sooner. That would make things more efficient, too, I'm sure.

MS. McLEOD: So, I think at this point we've --

THE COURT: I think the schedule is good enough.

We'll leave it that way.

December 7 for lists of the documents on which you're going to rely to prove an advice of counsel.

Anything else, Ms. McLeod?

MS. McLEOD: Nothing else from the government, your Honor.

THE COURT: Mr. Nitze?

MR. NITZE: Nothing else from us. Thank you, Judge.

THE COURT: Ms. Swette?

MS. SWETTE: Nothing else on behalf of Mr. Amar. Thank you, your Honor.

THE COURT: Thank you all for this wonderful session. See you soon.

(Adjourned)